UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 22

Docket No. CH-0752-08-0500-I-1

Brian A. Miller,

Appellant,

v.

United States Postal Service,

Agency.

March 6, 2009

James Harris, Chicago, Illinois, for the appellant.

James B. Franks, Esquire, Chicago, Illinois, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision sustaining his removal. For the reasons set forth below, the Board GRANTS the appellant's petition for review under 5 C.F.R. § 1201.115 and AFFIRMS the initial decision AS MODIFIED by this Opinion and Order.

BACKGROUND

¶2 On January 30, 2007, the agency issued the appellant, a City Letter Carrier in Chicago, Illinois, a letter of warning for his failure to maintain a regular schedule and informed him that future attendance deficiencies would result in more severe discipline. Initial Appeal File (IAF), Tab 4 at 68-69. The agency

issued a notice of proposed removal, dated February 8, 2008, charging the appellant with failure to maintain regular attendance between December 8, 2007, and January 22, 2008. *Id.* at 32-34. The agency sent the notice to the appellant via certified mail, Express Mail, and first-class mail on February 19, 2008. *Id.* at 34. It attempted to deliver the notice by Express Mail on February 20 and 21, 2008, and a notice advising the appellant of his Express Mail letter was left at his address on both days. IAF, Tab 7 at 11. On February 28, 2008, after the appellant had failed to claim his Express Mail letter, the letter was designated "[u]nclaimed" and returned to the agency on February 29, 2008, where it was signed for by "JHARRIS." *Id.* On April 17, 2008, the agency issued a final decision removing the appellant, effective April 19, 2008. IAF, Tab 1 at 9-11.

¶3 The appellant filed an appeal with the Board. *See* IAF, Tab 1. He asserted that the agency committed harmful error because he never received the notice of proposed removal "in person" and was not given the proposal notice in time to file a grievance, even though the agency "claimed to have mailed the documents." *Id.* at 3, 6. The appellant's representative subsequently asserted in a "Narrative Response" that the appellant "never received" the February 8, 2008 proposal notice mailed to him by his supervisor and that the Express Mail and certified mail were returned unclaimed back to the Post Office. IAF, Tab 7 at 1-2.

¶4 Based on the written record, because the appellant did not request a hearing, the administrative judge found that the agency proved its charge and rejected the appellant's affirmative defense of harmful error by the agency. IAF, Tab 14, Initial Decision (ID) at 2-7. The administrative judge recognized that after the appellant failed to claim the February 8, 2008 Express Mail letter after two delivery attempts, the appellant's representative at the agency, James Harris, signed for the package on February 29, 2008. ID at 5; *see* IAF, Tab 7 at 11. She emphasized that under the grievance procedure, the appellant had 14 days from the date of his receipt of the proposed action to file a grievance, and thus the appellant still could have timely grieved the action, especially as the agency did

not issue its final decision until April 17, 2008. ID at 6; *see* IAF, Tab 7 at 8-10, 12-14. The administrative judge also held that the agency's failure to provide the appellant with a pre-discipline interview, a discussion, or a referral to the employee assistance program prior to the removal action did not violate the appellant's due process rights. ID at 6-7. She noted that the agency was not required to initiate such procedures. ID at 7. Finally, she concluded that the agency demonstrated that the appellant's removal would promote the efficiency of the service, and that the deciding official appropriately considered the *Douglas* factors in deciding to remove the appellant. ID at 7-9. Therefore, the administrative judge found that the penalty of removal was within the bounds of reasonableness and affirmed the agency's removal action. ID at 10.

¶5 The appellant filed a petition for review. Petition for Review File (PFRF), Tab 1. The agency did not file a response.

ANALYSIS

¶6 The appellant asserts on review that the agency was required to notify him of his proposed removal in person, while "on the clock." PFRF, Tab 1 at 4. The appellant failed to present evidence that the agency was required to issue the proposed removal notice in person. The administrative judge, therefore, properly held that the appellant failed to show that the agency committed harmful error in not providing in-person notification of his proposed removal. *See* ID at 6. She also correctly held that the appellant failed to show that the agency committed harmful error or violated his due process rights by not providing him with a pre-disciplinary interview or a referral to the employee assistance program prior to proposing his removal. ID at 6.

¶7 The appellant also asserts on review that the proposal notices sent via Express Mail and certified mail were returned to the agency unclaimed and that agency employee James Harris, who would eventually become his representative, signed for the Express Mail letter as part of his job duties when it was returned to

the mail facility and such action did not satisfy the appellant's due process rights. PFRF, Tab 1 at 4-5. In support of his assertion, and for the first time on review, the appellant submits a signed, unsworn statement by his representative, Mr. Harris, asserting that he did not sign for the Express Mail letter as the appellant's representative on February 29, 2008. *Id.* at 9. Rather, Mr. Harris explains that he signed for the letter in the performance of his normal duties as the Express Mail clerk and as an agent of the supervisor on duty, and he thereafter placed the unopened letter on the supervisor's desk. *Id.* He further explains that he did not become the appellant's representative until April 25, 2008, and therefore asserts that the administrative judge erred in concluding that the appellant's representative signed for the letter on February 29, 2008, and in concluding that the appellant's due process rights were thus satisfied. *Id.* With his petition for review, the appellant also submits clock rings from February 29, 2008, showing that Mr. Harris worked his normal schedule to demonstrate that Mr. Harris signed for the unclaimed letter as part of his job duties that day. *Id.* at 12. The appellant also submits a signed, unsworn statement from Mr. Harris' supervisor confirming that Mr. Harris worked as the Express Mail clerk on February 29, 2008. *Id.* at 13.

¶8 Generally, the Board will not consider evidence submitted for the first time with a petition for review absent a showing that it was unavailable before the record closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980); 5 C.F.R. § 1201.115. However, the Board will consider evidence submitted for the first time on petition for review that was available before the record closed below when the party was not put on notice of the nature of a dispositive issue until the issuance of the initial decision. *Lewis v. Department of the Navy*, 65 M.S.P.R. 28, 32 (1994); *see also Gonzales v. Department of the Navy*, 99 M.S.P.R. 97 (2005). In *Gonzales*, an Individual Right of Action (IRA) appeal, the Board considered an affidavit submitted on review by Mr. Gonzales' representative regarding the date on which the representative received correspondence from the Office of Special Counsel,

which was related to the timeliness of Mr. Gonzales' IRA appeal. *Gonzales*, 99 M.S.P.R. 97, ¶¶ 7-9. The Board considered the affidavit as having been unavailable before the record closed below because "the AJ failed to inform the appellant prior to the close of the record that she would rely on a presumption of due delivery and receipt, with the result that the appellant was improperly denied the opportunity to attack or rebut the presumption below." *Id.* ¶ 9. Similarly, here, the appellant could not have anticipated that the administrative judge would match the name on the delivery confirmation for the unclaimed Express Mail letter with the name of the appellant's representative and infer that Mr. Harris signed for the unclaimed letter as the appellant's representative, satisfying the appellant's due process rights. *See* ID at 5-6.

¶9 Additionally, the agency did not rely on Mr. Harris' signature as evidence that the notice of proposed removal was delivered to the appellant until its final submission on the day the record closed. *See* IAF, Tab 12; Tab 13 at 4, 8. Thus, the appellant should have had an opportunity to reply to the agency's submission, which put him on notice that the agency relied on Mr. Harris' signature to prove the appellant's receipt of the notice of proposed removal by Express Mail. *See Schucker v. Federal Deposit Insurance Corp.*, 401 F.3d 1347, 1356 (Fed. Cir. 2005) ("[I]t is error to close the record without affording parties an opportunity to submit rebuttal evidence."); *Nevins v. U.S. Postal Service*, 107 M.S.P.R. 595, ¶ 17 (2008) (finding it appropriate to consider new evidence on petition for review because the appellant was not informed of the evidentiary conflict until she received the agency's final submission on the date the record closed); *Bell v. Department of Homeland Security*, 95 M.S.P.R. 580, ¶¶ 9-11 (2004) (recognizing that the administrative judge issued the initial decision only one day after receiving the agency's response identifying a dispositive issue); *see also* IAF, Tab 12.

¶10 Therefore, while it is clear that the information contained in the evidence submitted by Mr. Harris on review was available before the record closed below,

we find it appropriate to consider this evidence. The appellant was surely aware that his receipt of the notice of proposed removal was an issue in this appeal because he raised it, IAF, Tab 7 at 1; however, we find no evidence in the record to suggest that the appellant was made aware or could have foreseen that the act of Mr. Harris in signing for the unclaimed Express Mail letter could become a dispositive issue until the issuance of the initial decision.

¶11 Considering all of the evidence submitted below and the new evidence submitted on review, we conclude that the AJ erred in finding that the appellant received the proposal notice sent via Express Mail. *See* ID at 5. On his Board appeal form, the appellant asserted that the agency "claimed to have mailed" the proposal notice. IAF, Tab 1 at 6. He also submitted a tracking slip showing that notice of the Express Mail letter was left at his address on two occasions, but the letter was eventually returned to the agency, where it was signed for by Mr. Harris. IAF, Tab 7 at 11. Mr. Harris' signed statement, submitted for the first time on review, explains that he signed for the unclaimed notice of proposed removal just as he would sign for all Express Mail that was returned as unclaimed to the agency. PFRF, Tab 1 at 9. He further explains that he did not open the package, but placed it on his supervisor's desk. *Id.* Responding to the assertion that the appellant never received the Express Mail letter, the agency relied on the fact that the letter was "delivered on February 29, 2008 by Express Mail." IAF, Tab 13 at 8. In support of its assertion, the agency cites only to a delivery confirmation slip stating that the item was delivered on February 29, 2008, and was signed for by "JHARRIS." *Id.* at 8, 18. Accordingly, the administrative judge erred in finding that the appellant received the notice of proposed removal sent via Express Mail simply because it was signed for by Mr. Harris. *See* ID at 6.

¶12 However, even if the appellant could prove that he failed to receive both the Express Mail letter and the certified letter, such failure does not constitute harmful error by the agency. The appellant has not cited a law, rule, or regulation

that required the agency to send his notice of proposed removal by Express Mail or certified mail. Additionally, the appellant has failed to demonstrate that any such error likely would have caused the agency to reach a decision different from the one it would have reached in the absence or cure of the error. *See* 5 C.F.R. § 1201.56(c)(3). Therefore, the administrative judge correctly held that the appellant failed to prove his affirmative defense of harmful error. *See* ID at 6-7.

¶13 While we agree with the administrative judge that the appellant failed to prove harmful error, the administrative judge's error regarding the appellant's receipt of the Express Mail letter leaves an open question with respect to whether the appellant received minimum due process of law. An agency's failure to provide a tenured public employee with an opportunity to present a response, either in person or in writing, to an appealable agency action that deprives him of his property right in his employment constitutes an abridgement of his constitutional right to minimum due process of law, i.e., prior notice and an opportunity to respond. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). While the appellant submitted the Express Mail tracking slip to prove that he never received the proposal notice by Express Mail, he failed to submit evidence proving that he did not receive the proposal notice sent by the agency via first-class mail. Accordingly, the appellant did not prove a violation of his due process rights.

¶14 Finally, we discern no error in, and the appellant has not challenged, the administrative judge's findings that the agency proved its charge of failure to maintain a regular work schedule by preponderant evidence, that disciplinary action against the appellant will promote the efficiency of the service, and that the penalty of removal is within the tolerable limits of reasonableness. *See* ID at 4, 7, 9-10.

ORDER

¶15 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.